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IN THE

Supreme Court of the United States

No. 66

ALBERT A. LIST, Petitioner,

v.

LOUIS C. LERNER, *et al.*

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 66

ALBERT A. LIST,

Petitioner,

v.

LOUIS C. LERNER, *et al.*

PETITION FOR REHEARING

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A petition for a writ of certiorari herein was denied by this Court on October 11, 1965. The petition had been docketed March 30, 1965 as No. 1027 October Term, 1964.

In an order entered May 17, 1965 the Court invited the Solicitor General to file a brief expressing the views of the United States in this case.

The requested memorandum was filed before August 16, 1965.

In this memorandum the Government's counsel, although conceding the many errors made by the District Court and the Court of Appeals, nevertheless expressed the opinion that the Court ought not to grant certiorari.

POINT I

Events have occurred since the denial of the writ which clearly takes this case outside the general rules which govern this Court in the granting or denial of certiorari in the ordinary case.

Occurrence after the denial of a petition of new facts, justifies re-examination of the application.

> *Paramount Publix Corp.* v. *American Tri-Ergon,* 293 U. S. 528, 79 L. ed. 638;
> *Altoona Publix Theatres* v. *American Tri-Ergon,* 293 U. S. 528, 79 L. ed. 638;
> *Wilmer & Vincent* v. *American Tri-Ergon,* 293 U. S. 528, 79 L. ed. 638.

On October 13, 1965 petitioner's counsel first learned of the new facts above referred to when he received copies of the documents in the appendix annexed hereto.

Prior to August 11, 1965, the Securities and Exchange Commission filed a proceeding (File 3-268) against Louis Lerner, one of the principal defendants in this case, which resulted in an order being entered August 16, 1965 suspending Lerner and his corporation for five days for the offenses charged and set out in the appendix to this brief. It is to be noted that the offenses with which Lerner is there charged involving transactions in the stock of Maxson Electronics Corp., are identical to the charges made by petitioner herein regarding Fashion Park's stock.

The consent private order in the Maxson proceeding did not become a matter of public record until October 7, 1965, although entered August 16, 1965.

It was just prior to August 16th that the Acting Solicitor General filed the Government's memorandum in this case. It was not disclosed to this Court in said memorandum that

at the very time it was being filed the SEC had pending a proceeding charging Lerner with wilfully violating Sections 10-b and 15(c)(1) of the Securities Exchange Act of 1934 and Rules 10b-5 and 15(c)-1-2 thereunder in connection with transactions in Maxson Electronics Corp. of the very type he was charged with in this case in Fashion Park Corporation stock.

The Government's memorandum herein should have included a reference to the pendency of the administrative proceeding against Lerner in Maxson. Had this been done, the Court would have been made aware of the fact that the SEC was considering charges against Lerner at or about the same time the Government was preparing the memorandum herein based on an identical pattern of non-disclosures.

In the instant case, Lerner and his relatives, friends, broker and family deprived List of a sum in excess of $162,000 plus interest.

Would this Court have denied certiorari in the instant case if it had known of the pendency of an administrative proceeding against the same Lerner by the Commission involving another company, and that in fact an order had been entered proscribing Lerner's conduct but publication of the order held up?

Lerner's conduct as an inside director in both the Maxson case and the Fashion Park case was identical. He was a director of both companies. He attended the meeting of directors of Fashion Park on November 4, 1960 and actually participated in the passage of the resolution to sell or merge the business, creating a complete change of business. He had inside knowledge in the Maxson case of the favorable Government contract, and made purchases based on his inside knowledge.

In the Maxson proceeding, the majority of Lerner's purchases were for the accounts of relatives prior to the

public disclosure of Maxson's favorable Government contracts, while in the instant case Lerner allocated 800 shares to his broker Green and Green's family and 4,300 shares to relatives and friends and a security company that he controlled.

POINT II

Lerner's conduct as an insider director completely disregarded the SEC Acts and Rules.

Lerner's action in the Maxson case was identical to his course of conduct in the Fashion Park case.

Lerner was a director of Fashion Park and also of Maxson.

Lerner attended the meeting of directors of Fashion Park on November 4, 1960 and participated in the passage of the resolution to sell or merge the business creating a complete change of position.

Lerner made no disclosures of his inside knowledge either in the Maxson case or the Fashion Park case.

POINT III

This Court granted certiorari in *Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U. S. 180.

In the Capital Gains case, the Second Circuit Court of Appeals on the reargument sat *in banc*. Judge Moore wrote the majority opinion, concurred in by Judges Lumbard, Waterman, Friendly and Hays, 306 F. 2d 607. The minority opinion was written by Chief Judge Clark, concurred in by Judges Marshall, Kaufman and Smith, page 611. C. J. Clark opened his dissent with the following:

> "Decision in the present case turns on the meaning and scope of the Investment Advisers Act of 1940,

last of the six great regulatory statutes of the era 1933-1940 controlling the marketing of investment securities. We need to recall the dramatic origin of these statutes as an outcome of the greatest stock market crash in history and the exhaustive studies then made of the evils of stock market manipulation and fraudulent stock selling. It seems universally conceded—and the favorable judicial attitude records the fact—that this legislation was brilliantly successful in responding to a genuine social need. It is a prime demonstration of the capacity of a democratic government to meet a social crisis skillfully and positively. While it may not have solved every problem, it went a long way in facing the issues involved and protecting the investor from being victimized."

Judge Clark then continues at page 612 criticizing the majority opinion as follows:

> "After this history of successful achievement it comes as a real shock to find a majority of this court ready to scuttle the last of these highly useful statutes and leave it as but a shell."

On page 614 Judge Clark continues:

> "These statutes form an interrelated pattern of regulation of the securities industry, all of which are essential for the adequate protection of the investor."

Judge Clark's dissent both in the previous sentence and in many sentences thereafter makes it crystal clear that the laws were passed primarily to protect the public against investors like Lerner.

Continuing Judge Clark's opinion:

> "One of the chief methods of regulation followed in the several acts was the requirement of full disclosure. In contrast to the common law, which was premised on the ancient *maxim caveat emptor*, the

regulatory legislation adopted the philosophy of consumer protection, 'let the seller also beware.' "

This dissent was upheld by the U. S. Supreme Court in *Securities and Exchange Commission* v. *Capital Gains*, 375 U. S. 180, Justice Goldberg writing the opinion.

CONCLUSION

For all of the grounds herein stated, it is respectfully submitted that this petition for a rehearing of petitioner's application for a writ of certiorari should be granted and the motion for certiorari should likewise be granted.

Respectfully submitted,

ARTHUR F. DRISCOLL,
EDWARD C. RAFTERY,
MILTON M. ROSENBLOOM,
EDMUND C. GRAINGER, JR.

Of Counsel,

O'BRIEN, DRISCOLL & RAFTERY.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

EDWARD C. RAFTERY.

APPENDIX

Order for Private Proceedings Pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934.

ADMINISTRATIVE PROCEEDING
FILE NO. 3-268

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

August 16, 1965

In the Matter of

LERNER & CO., INC. (8-9111)
LOUIS C. LERNER

I

The Commision's public official files discloses that:

A. Lerner & Co., Inc. a Massachusetts corporation with offices at 10 Post Office Square, Boston, hereinafter referred to as registrant, became registered as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 on December 15, 1960 and is still so registered.

B. Louis C. Lerner has been the president and a director of registrant and the owner of 10% or more of registrant's common stock since November 23, 1960.

C. Registrant is a member of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Securities Exchange Act of 1934.

D. Registrant is a member, within the meaning of Section 3(a)(3) of the Securities Exchange Act of 1934, of the American Stock Exchange, a national securities exchange registered pursuant to Section 6 of the Securities Exchange Act of 1934.

E. The common stock of Maxson Electronics Corp. is listed on the American Stock Exchange.

II

As a result of an investigation, the Division of Trading and Markets has obtained information which tends to show and it alleges that:

During the period from about June 18, 1964 to about June 19, 1964, registrant and Louis C. Lerner, hereinafter referred to as respondents, singly and in concert, wilfully violated and wilfully aided and abetted violations of Sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934 and Rules 10b-5 and 15c1-2 thereunder in that respondents, in connection with the purchase of and in effecting transactions in the securities of Maxson Electronics Corp. (Maxson), directly and indirectly, employed devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, and engaged in acts, practices and courses of business which would and did operate as a fraud and deceit upon sellers and prospective sellers of Maxson securities. Said conduct and activities occurred as follows:

A. Louis C. Lerner is a director of Maxson.

B. On or about June 11, 1964, Louis C. Lerner learned that Maxson Electronics Corp. was the low bidder on a contract to be awarded by the Navy Department to manu-

facture missiles and had been invited to the Navy Department's Washington, D. C. offices for the purposes of negotiating such contract. On or about June 19, 1964, Louis C. Lerner learned that William C. Maxson, the president of Maxson, had executed the contract on behalf of the company. On June 22, 1964 an article appeared in the Scranton Times, a Pennsylvania newspaper, which stated that Maxson had been awarded a very substantial contract to manufacture missiles for the Navy. On June 23, 1964 at approximately 12:50 p.m. the news of the contract award to Maxson was made public via the Dow Jones wire service.

C. In the period from about June 18, 1964 to about June 19, 1964, respondents with knowledge of the non-public material corporate information mentioned in paragraph B hereof solicited purchases and executed purchases for accounts at registrant in the common stock of Maxson. The majority of these purchases were for the accounts of relatives of the respondents. All of said purchases were caused by respondents to be executed on the American Stock Exchange prior to the public disclosure of such information and without disclosing such information to the sellers of such shares.

III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary and appropriate in the public interest and for the protection of investors that private proceedings be instituted to determine:

(a) whether the allegations set forth in Section II are true, and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations; and

(b) what, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a)(3) of the Exchange Act.

IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before a hearing examiner to be designated by a further order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that each party file an answer to the allegations contained in the order for proceeding within 15 days after service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice.

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceedings may be determined against such party upon consideration of such order for proceedings, the allegations of which may be deemed to be true.

This order shall be served upon Lerner & Co., Inc. and Louis C. Lerner personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceedings will be permitted to participate or advise in the decision upon this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

Appendix.

Findings, Opinion and Order Suspending Broker-Dealer Registration and Membership on National Securities Exchange.

(Securities Exchange Act Release No. 7721)

ADMINISTRATIVE PROCEEDING
FILE NO. 3-268

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
October 7, 1965

In the Matter of

LERNER & CO., INC.
10 Post Office Square
Boston, Massachusetts

and

LOUIS C. LERNER

(8-9111)

Securities Exchange Act of 1934—
Sections 15(b), 15A and 19(a)(3)

In these proceedings pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934 ("Act"), the order for proceedings alleges that Lerner & Co., Inc. ("registrant") and Louis C. Lerner, president and a director and principal stockholder of registrant, wilfully violated Sections 10(b) and 15(c) of the Act in connection with purchases on or about June 18 and 19, 1964, of shares of Maxson Electronics Corp. ("Maxson"), of which Lerner was a director. The order for proceedings further alleges that after respondents learned that Maxson

was negotiating for and had been awarded a substantial defense contract, and prior to public disclosure of such material information, registrant, without disclosing such information to sellers, solicited and executed purchases of Maxson shares, the majority of which were for the accounts of relatives of Lerner.

Registrant and Lerner have entered into stipulations and consents in which they waive a hearing and post-hearing procedures. In addition, without admitting or denying the allegations in the order for proceedings, registrant consents to the entry of an order suspending its broker-dealer registration and its membership on the American Stock Exchange for a period of not more than five business days, and Lerner consents to the entry of an order pursuant to Section 15(b)(7) of the Act suspending him from being associated with a broker-dealer for the same period. The Commission, on the recommendation of its Division of Trading and Markets, has determined to accept these stipulations and consents.

On the basis of the order for proceedings and the stipulations and consents, it is found that it is in the public interest to suspend registrant's broker-dealer registration and its membership in the American Stock Exchange for a period of five business days and to suspend Lerner from being associated with any broker-dealer for a like period.

Accordingly, IT IS ORDERED that the registration as a broker and dealer and the membership in the American Stock Exchange of Lerner & Co., Inc. be, and they hereby are, suspended for five business days and that Louis C. Lerner be, and he hereby is, suspended from being associated with any broker-dealer for the same period, such suspensions to begin at the opening of business on October 11, 1965.

For the Commission (pursuant to delegated authority).

ORVAL L. DUBOIS,
Secretary.